Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1160

ALLIED MILLS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 110, AFL-CIO,

Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The American Federation of Grain Millers Local 110, AFL-CIO (herein called "Union") respectfully submits this brief in opposition to the Petition for a writ of certiorari filed by Allied Mills, Inc. (herein called "Company").

The Union filed its own petition in the Court of Appeals to review the subject decision and order of the National Labor Relations Board (herein called "NLRB" or "Board") reported at 218 NLRB 281, and in said petition it sought greater remedies than ordered by the Board. The Union's petition was

consolidated with the Board's petition for enforcement of its order and the Union was given leave to intervene.[1] Thus, the Union, as a party in the proceedings below, has an interest in the subject petition in accordance with Rule 21(4) of the Rules of this Court.

QUESTIONS PRESENTED.

1. Whether substantial evidence supports the Board's findings that the Company refused to bargain in good faith with the Union concerning the transfer of unit employees from its old plant in Buffalo, New York, to its new plant in Alexander, New York, in violation of Section 8(a)(5) and (1) of the Act,[2] in consideration of all the facts and circumstances, including but not limited to:

   (a) the Company's threats that it would not take any unionized employees to Alexander and would never have a union at Alexander, found to be in violation of Section 8(a)(1) of the Act; and

   (b) the Company's refusal to transfer, and its termination of and refusal to reinstate Buffalo employees because of their union membership, found to be in violation of Section 8(a)(3) and (1) of the Act.

2. Whether the Board's remedial order, enforced by the Court of Appeals, was within the Board's wide area of discretion under the Act.

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1. See the Court of Appeals' order dated September 4, 1975, reproduced as an appendix to this brief (A. 1). There is no question that the Union as a partially successful and partially unsuccessful charging party before the Board had the right to petition for review and/or intervene in the Board's petition for enforcement. *International U., United A., A & A. I. W.* v. *Scofield,* 382 U. S. 205, 86 S. Ct. 373 (1956).

2. National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151 *et seq.*) reproduced in relevant part as Appendix E attached to the Company's petition (A. 59a-71a).

STATEMENT OF THE CASE.

The Company, engaged in the feed industry, operated a plant in Buffalo for many years, and since 1938 the Union has been the collective bargaining representative of the production and maintenance employees. At the time of the events herein, essentially during 1973, the Union and the Company were parties to a collective bargaining agreement covering said employees, which then was scheduled to remain in effect through June 30, 1974 and from year to year thereafter unless either party gave notice of an intent to terminate or modify (A. 13a).

The Company never notified the Union of its plans to construct a facility in Alexander, about 30 miles away, and to close the Buffalo facility; however it did acknowledge those plans when the Union raised to the Company the rumors it had heard to that effect (A. 14a). The parties met on this matter, including the specific issue of the transfer of employees with their work to the nearby new location (A. 14a). It was found as an established fact, ". . . the Company adamantly refused to discuss the transfer of the Buffalo employees to the Alexander plant" (A. 14a and see also: 19a, 20a, 24a n. 18, 25a, 31a, 32a and 33a). Needless to say, by taking this position the parties were precluded from discussing the further question of the bases upon which employees could transfer, *i.e.,* the conditions of employment at the Alexander plant.

The Administrative Law Judge succinctly summarized the comparison of the old and new plants as follows:

> In short, the same raw materials that formerly came to Buffalo now come to Alexander; the same product is made there, and substantially the same customers are serviced from there. Due to the more efficient and sophisticated machinery at Alexander, the production process is performed more efficiently with substantially fewer employees. When asked what the difference was between the production

functions in the two plants, plant manager Williams replied, "Basically it has to do with numbers and multiple jobs." That is to say that, as previously explained, one employee at Alexander, due to the more advanced machinery, can perform more jobs in different places in the plant, and the same is true of maintenance functions. (A. 26a-27a.)

In sum, it was found, "the Alexander plant is neither a merger nor consolidation with previous operations of [the Company]" (A. 41a) but merely a relocation and continuation of production from Buffalo to Alexander (A. 46a).

During the period of time in which the parties met, essentially the latter half of 1973, the following significant events took place:

(a) The Company, ". . . in marked contrast to its policy respecting the unit employees, freely offered to transfer all of its [unrepresented] office employees and supervisors to Alexander. Indeed, [the Company] did not refer to the process as a 'transfer' but rather as a 'continuation of their same job' ". (A. 36a.) Of the 21 persons who were offered the "continuation of their same job," 12 accepted. (A. 36a n. 38.)

(b) The Company supervisor slated to be the superintendent at Alexander, with the authority to hire new applicants, Starkey, told employees:

(i) the Company was not taking any of the employees to Alexander;

(ii) there would never be a union in Alexander; and

(iii) he (Starkey) did not want a union because he did not want "anybody dictating to me". (A. 23a-25a.)

These statements were correctly found to be unlawful under Section 8(a)(1) of the Act. (A. 25a.) Indeed, the Company's principal spokesmen told the Union representatives during their meetings that among their reasons for concluding there would be no transfers was because the Buffalo unit employees were too union oriented and militant. (A. 19a, 21a, 24a n. 18.)

(c) Notwithstanding the Company's "predetermined policy of refusing to transfer to Alexander any of the Buffalo employees represented by the Union" (A. 31a), the Union, around August 10, advised employees it was continuing in its efforts to have Buffalo employees transfer to Alexander and it posted a list for those men to sign who desired work at the new plant (A. 18a). Later, Union representative Rybka presented to the Company a partial list of 18 unit employees desiring transfer, to which the Company replied, "the Union could submit such a list but that it would not do any good." (A. 20a.) At a later time a more complete list of 28 names was sent to the Company however the Company never responded. (A. 21a.) Another copy of the list was again sent later but never favored with a response. (A. 22a.)

Amid the various submissions of these lists indicating the desire of a sustantial number of Buffalo employees to continue their work at nearby Alexander,[3] and the Company's rejection of same, the Company offered its unrepresented employees the continuation of their employment (A. 36a); hired new people with less or no experience in the industry while conceding that Buffalo employees could perform or easily learn to perform the work at Alexander (A. 36a-37a); and indeed Starkey, conceded, "he would 'naturally prefer' more experienced employees to those who knew nothing about the commodity with which they were dealing" (A. 37a n. 39).[4]

3. The 28 Buffalo employees desiring transfer to Alexander would have been sufficient or more than sufficient to entirely staff the Alexander facility (A. 27a n. 20, 42a), but "were denied transfer as the result of the [Company's] unfair labor practices" (A. 41a).

4. For example the former semi-automatic equipment at Buffalo was operated by "a very capable employee who received a letter of commendation from the company in 1973 . . . yet the company

(Footnote continued on next page)

Upon these facts the Administrative Law Judge, affirmed by the Board and enforced by the Court of Appeals, found the Company:

(a) unlawfully threatened employees that they would not be transferred to Alexander because of their membership in and activities on behalf of the Union (A. 22a-25a, 45a);

(b) unlawfully terminated its Buffalo unit employees and refused to transfer them to Alexander because of their membership in and activities on behalf of the Union and to rid itself of the Union (A. 38a-40a, 45a); and

(c) unlawfully refused to bargain and failed to bargain in good faith with the Union concerning the transfer of employees from Buffalo to Alexander in order to rid itself of the Union (A. 29a-38a, 44a).

To remedy these violations the Administrative Law Judge recommended, the Board ordered and the Court of Appeals enforced an order that the Company, *inter alia*:

(a) continue to recognize and upon request bargain with the Union on behalf of its employees in an appropriate unit at the Alexander plant pursuant to the collective bargaining agreement which was in force and effect between the parties at the time of the relocation (A. 46a); and

(b) offer immediate and full reinstatement to those Buffalo unit employees who signed the list and thereby expressed their desire to transfer, paying said employees back pay and placing others desiring transfer on a preferential hiring list. (A. 41a-43a).

(Footnote continued from preceding page.)
preferred to hire an untrained employee in Alexander to perform that job which was described as probably the most sophisticated position in the plant" (A. 36a-37a).

ARGUMENT.

I.

THE BOARD'S ANALYSIS AND DECISION IS THOROUGHLY CONSISTENT WITH WELL ESTABLISHED AND GOVERNING PRINCIPLES OF FEDERAL LABOR POLICY.

The Company's argument displays an astonishing misconception of the facts in this case and governing principles of law. We are dealing here with a long established bargaining unit which was relocated—*not* discontinued or merged, but relocated and continued—to a facility only 30 miles away. Under those circumstances, the Company refused to consider its employees' desire to continue their employment on the same unit work by transfer to the new facility, although it admitted that said employees are at least equally qualified or better qualified by reason of their experience in the unit. Further, the Company negotiators gave as a reason for said refusal the employees' association with and representation by the Union reenforced by threats from supervision to the same effect. Also, the Company discriminatorily offered transfer to only non-represented employees. Under these circumstances the Board very correctly found the Company's conduct to be in violation of Sections 8(a)(1) and (3) and (5) of the Act.

A. The Refusal to Transfer and Termination of Buffalo Unit Employees Was Clearly Violative of Section 8(a)(3) and (1) of the Act.

The record is replete with expressions by the Company that Buffalo employees would not be transferred to Alexander, and thus terminated at the close of the Buffalo facility, because of their membership in an association with the Union (A. 19a, 21a, 23a-25a, 24a n. 18). Moreover there exists the inexplicable

offer to nonrepresented employees of a "continuation of their same job" relocated to Alexander while refusing any similar offer to unit employees.[5]

These findings demonstrate the gross error of the Company's claim that "8(a)(3) violation was found through the tests for bad faith 8(a)(5), not discrimination" (Pet. Brief p. 11). Clearly the Board found a violation of 8(a)(3) upon all the circumstances including the foregoing cited factors which are independent of the Company's refusal to bargain.

From these undisputed circumstances one cannot question that this conduct is discriminatory on its face—the conduct speaks for itself—and an employer's arguments in justification of said conduct "must be unavailing" because of the application of the common law rule that one is held to intend the foreseeable consequences of his act. *Radio Officers' Union of Commercial Telegraphers Union, AFL-CIO* v. *N. L. R. B.*, 347 U. S. 17, 45-46; 74 S. Ct. 323, 338-339 (1954); *N. L. R. B.* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34, 87 S. Ct. 1792, 1798 (1967); *N. L. R. B.* v. *Erie Resistor Corporation*, 373 U. S. 221, 228; 83 S. Ct. 1139, 1145 (1963); *Melville Confections, Inc.* v. *N. L. R. B.*, 327 F. 2d 689, 691-92 (7th Cir. 1964); *Aero-Motive Manufacturing Co.*, 195 NLRB 790, 791-792, *enf'd* 475 F. 2d 27 (6th Cir. 1973); *Darling & Company*, 170 NLRB 1068, 1072, *enf'd* 420 F. 2d 63, 65-66 (7th Cir. 1970); *The Kroger Co.*, 164 NLRB 362, 374, *enf'd* in relevant part 401 F. 2d 682, 686 (6th Cir. 1968); *Dura Corporation*, 156 NLRB 285, 288-289, *enf'd* 380 F. 2d 970, 972 (6th Cir. 1967).

As the foregoing demonstrates, these are well established uniformly applied principles which do not require review or reconsideration by this Court.

5. The Administrative Law Judge correctly observed this inherent inconsistency since nonrepresented employees or supervisors would be required to reorient themselves to the new plant and its newer equipment exactly in the same way as unit employees (A. 37a n. 40).

B. The Refusal to Bargain and Failure to Bargain in Good Faith with Respect to the Transfer of Employees Was Clearly Violative of Section 8(a)(5) and (1) of the Act.

The Board's conclusion, ". . . an Employer is required to negotiate not only respecting the shut-down, but also the bases and conditions on which employees affected by the termination may transfer to the new location and thus continue to be employed" (A. 34a), is a most correct analysis of law, applying uniform and consistent precedent of this Court and various Circuit Courts.[6]

The statutory obligation to bargain in a situation involving the transfer or relocation of unit work means more than simply discussing whether unit employees wish to transfer to the new location or the terminal benefits for those who do not transfer. The obligation to bargain also requires bargaining in good faith over the terms and conditions of employment at the relocated facility, if it is clear, as it is in this case, that the number of employees who desire to continue their work would constitute a majority of the unit at the new facility and if it is clear, as it is here, that there is no legitimate justification for barring their transfer (such as by reason of an inability to adequately perform or be trained for the jobs at the new facility or that said jobs have been eliminated or substantially altered). This is so because it is well settled that employees have the right to preserve their bargaining unit work. *National Woodwork Manufacturers Association* v. *N. L. R. B.*, 386 U. S. 612, 87 S. Ct. 1250 (1967); *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 85 S. Ct. 398 (1964); *International Ass'n of M. & A. W.* v. *Northeast Airlines, Inc.*, 473 F. 2d 549, 557 (1st Cir. 1972); *Fraser & Johnston Company* v. *N. L. R. B.*, 469 F. 2d 1259

6. The Board cited and relied on: *Cooper Thermometer Company*, 160 NLRB 1902, enforced in pertinent part 376 F. 2d 684 (2nd Cir. 1967); *Fraser & Johnston*, 189 NLRB 142, enforced in pertinent part 469 F. 2d 1259 (9th Cir. 1972); *Westinghouse Electric Corporation*, 174 NLRB 636.

(9th Cir. 1972); *International Ladies' Garment Workers U.* v. *N. L. R. B.*, 463 F. 2d 907, 915-919 (D. C. Cir. 1972); *N. L. R. B.* v. *C. H. Sprague & Son Co.*, 428 F. 2d 938, 941 (1st Cir. 1970); *Weltronic Company* v. *N. L. R. B.*, 419 F. 2d 1120, 1123 (6th Cir. 1969); *N. L. R. B.* v. *Die Supply Corp.*, 393 F. 2d 462 (1st Cir. 1968); *Cooper Thermometer Co.* v. *N. L. R. B.*, 376 F. 2d 684 (2nd Cir. 1967). It is upon this basis that the Board with Court approval has required an employer to recognize a union as the bargaining agent at the relocated facility and apply the terms and conditions of the existing contract, if any, to that facility or bargain in good faith with respect to the wages, hours, terms and conditions of employment of the unit employees at the new facility.

As the law in this area is firmly settled and consistently applied, no basis exists for consideration or review by this Court.

C. The Company's Claims Are Wholly Misconceived and Meritless.

The Company has miscited certain facts in this matter and has thoroughly misconceived the factual and legal bases upon which the Board and lower Court ruled. A review of its claims will so show and further establish that the order issued in this matter raises no new issues and is consistent with well established precedents of this Court.

The Company first argues that by this order an employer is precluded from making the counterproposal that transferring employees continue at the new plant as new hires (Pet. Brief, pp. 16-18). That contention was never at issue in this matter for the following two reasons: (1) the Company here never made any counterproposal, it simply refused to discuss the matter (A. 14a and see: 19a, 20a, 24a n. 18, 25a, 31a, 32a and 33a); and (2) the Company admitted that it made no such counterproposal but only "offered applications" for employment at

Alexander (A. 30a).[7] Thus the Company's factual argument that it would allow "employees to continue at the new plant as new hires" (Pet. Brief, p. 16 is wholly incorrect. It counterproposed nothing and merely said it would allow Buffalo employees the opportunity to apply for employment; the Company never said it would hire employees who applied. Significantly, everybody and anybody can *apply* for employment, the Company was then advertising for applications (A. 21a), therefore the offer of applications was no offer at all since it was then available to the entire community.[8]

Further, the Company's argument in this regard totally ignores the setting in which this erroneously termed "counterproposal" occurred. The Company totally ignores the fact that a reason for rejecting the transfer proposal was its desire to rid itself of "union oriented employees" (A. 19a, 21a, 24a n. 18) in marked contrast to its offer to all nonrepresented employees of "a continuation of their same job" (A. 36a). The Company also has ignored that the *Reed & Prince* rule was only one of several bases on which the Board found a bad faith refusal to bargain. The Board also looked at the untenability of the Company's bargaining claim (A. 35a-36a); the discriminatory and inconsistent refusal to transfer union represented employees while taking a different position on nonrepresented employees (A. 36a-37a); and that the Company's bargaining posture was amid antiunion threats and expressions (A. 37a-38a). Thus, contrary to the Company's contention, the Board properly looked at all the surrounding and relevant facts and circumstances in conclud-

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7. ". . . Labor Relations Director Bard testified as follows . . .:

"Q. I am asking you, did you make any proposals to them, with respect to transferring people?

"A. No we offered applications that the employees could put in for employment at Alexander and no one ever did." (A. 30a.)

8. In this regard the Board's reliance upon the quoted material from *N. L. R. B.* v. v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir. 1953) is well placed.

ing bad faith exactly as this Court has determined appropriate. *N. L. R. B.* v. *Insurance Agents International Union*, 361 U. S. 477, 508, 80 S. Ct. 419, 437 (1960); *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 155, 76 S. Ct. 753, 757 (1956). Therefore the Company's isolation of one case and its erroneous characterization of the facts must be ignored.

In its second argument the Company contends that the Board precluded the Company from taking the position in bargaining that it wanted to hire only from the Alexander area (Pet. Brief pp. 18-19). Again, the Company has misread the decision because the Board did not so hold. The Board in effect said the Company may not use that reason, *i.e.*, a desire to hire only from Alexander, as a basis to rid itself of union adherents. The underlying bases for this conclusion has been set forth immediately above (See *supra* pp. 11-12) and are equally applicable here except to explicate further that the Company's contention of a good faith desire to hire from Alexander was properly deemed wholly untenable (A. 35a-36a). The closeness of the plants, the antiunion threats and expressions and the discriminatory treatment of unit employees versus others can lead only the conclusion that the Company's expressions of a "moral obligation" to Genessee County was a later contrived ruse to cover its antiunion policy.[9] Therefore, the Board's order does not mean that employers, *in good faith*, may not propose hiring to be limited to the area of the relocated plant,[10]

9. The Administrative Law Judge relied in part on the Company's stipulations and offers to stipulate that Buffalo employees could perform the jobs at Alexander (A. 37a) and the official's statement that he would "naturally prefer" more experienced employees over those who knew nothing about the commodity with which they were dealing (A. 37a n. 39).

10. See for example *International Union, United A., A., & A. Imp. Workrs.* v. *N. L. R. B. (Pierce Governor Company, Inc.)*, 394 F. 2d 757 (D. C. Cir. 1968) where the employer bargained in good faith, was not motivated by an antiunion policy and a legitimate issue existed as to whether employees at the former plant had the physical capabilities of performing duties at the new plant. However, in that case the Court recognized, "a plant relocation does not in itself invalidate a union's representative status . . ." (394 F. 2d at 762).

it does mean, however, and properly so, that employers may not use that reason or any other as a cover for its true motive "to shake the Union". *N. L. R. B.* v. *Lewis*, 246 F. 2d 886, 888 (9th Cir. 1957), enforcing *California Footwear Company*, 114 NLRB 765.

In its third and final argument the Company attacks the manner in which the Board, by drawing inferences, concluded bad faith bargaining (Pet. Brief, p. 20). Of course, all can agree that no order is proper if based upon erroneous inferences, but it is equally clear that the Board must decide this type of case as well as others by drawing appropriate inferences. As stated by Justice Frankfurter in his concurring opinion *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 155, 76 S. Ct. 753, 757 (1956):

> A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

This Court also held, through Justice Frankfurter in his separate opinion in *N. L. R. B.* v. *Insurance Agents' International Union*, 361 U. S. 477, 508, 80 S. Ct. 419, 437 (1960):

> The Board's function in the enforcement of the duty to bargain does not end when it has properly drawn an inference unfavorable to the respondent from particular conduct. It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly its conduct at the bargaining table. *The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case*, and on the sufficiency of the whole record to justify its decision the courts must pass. (Emphasis supplied.)

The foregoing establishes conclusively that the Board's use of drawing inferences was wholly correct, and as shown in greater detail above, " . . . the totality of inferences which may appropriately be drawn from the entire conduct of the [Company]" compels the conclusions reached by the Board.

Therefore, from the foregoing we see there is nothing "new" or "vital" or in "conflict among the circuits." Nor do we see anything other than a uniform application of law upon the methods of analysis mandated by this Court. For these reasons the Company's petition should be denied.

II.

THE BOARD'S REMEDIAL ORDER IS A PROPER EXERCISE OF ITS BROAD STATUTORY AUTHORITY.

A. Underlying Principles.

In *Fibreboard Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 216-217, 85 S. Ct. 398, 405-406 (1964) this Court said:

> [Section 10(c) of the Act] "charges the Board with the task of devising remedies to effectuate the policies of the Act." National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344, 346, 73 S.Ct. 287, 289, 97 L.Ed. 377. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence * * *." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271. "In fashioning remedies to undo the effects of violations of the Act, the Board must drawn on enlightenment gained from experience." National Labor Relations Board v. Seven-Up Bottling Co., 344, 346, 73 S.Ct. 287, 289. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec. & Power Co. v. National Labor Relations Board, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568.

More recently this Court said in *N. L. R. B.* v. *Food Store Employees Union, Local 347*, 417 U. S. 1, 8, 94 S. Ct. 2074, 2079 (1974):

> Congress has invested the Board, not the courts, with broad discretion to order a violator "to take such affirmative action . . . as will effectuate the polices of [the Act]." 29 U.S.C. § 160(c); see e.g. Golden State Bottling Co., Inc. v. N. L. R. B., 414 U.S. 168, 176, 94 S.Ct. 414, 421, 38 L.Ed. 2d 388 (1973).

Applying these principles here we see the Board issued its traditional remedies for the violations found.[11] With respect to the Company's refusal to bargain the Board ordered it to take the following affirmative action:

> Upon request, bargain collectively with the above-named union as the exclusive bargaining representative of its employees in the appropriate unit, concerning the effects on the employees of the move from the Buffalo plant to the Alexander plant.
>
> * * * * *

and

> Continue to recognize and, upon request, bargain collectively with the above-named union as the exclusive bargaining representative of the employees in the appropriate unit, at the Alexander, New York, plant, pursuant to the collective bargaining agreement between the parties which was in force and effect at the Buffalo plant at the time of the relocation to Alexander, unless the parties mutually agree to do otherwise. (A. 46a.)[12]

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11. Indeed, the Union in the Court below unsuccessfully sought a remand to the Board for broader remedies such as: backpay for employees who may not have signed the transfer list because of the Company's threats, and the recovery of litigation costs for misconduct patently and deliberately inimical to the Act.

12. The above quoted order demonstrates the Company's grossly erroneous contention that it has been ordered to pay moving expenses and apply the old contract to the new plant (Pet. Brief p. 10).

(Footnote continued on next page)

There can be no question that an order to bargain upon request is appropriate and well within the Board's statutory powers. In *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 610, 89 S. Ct. 1918, 1938 (1969) this Court said:

> We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See N.L.R.B. v. Katz, 369 U.S. 736, 748, n. 16, 82 S.Ct. 1107, 1114, 8 L. Ed. 2d 230 (1962); N.L.R.B. v. P. Lorillard Co., 314 U.S. 512, 62 S.Ct. 397, 86 L.Ed. 380 (1942).

Moreover, in this case it was found that the Buffalo employees indicating a desire to transfer would have fully staffed the Alexander plant absent their discriminatory termination (A. 42a), thus the bargaining order is manifestly appropriate where, as here, all employees have chosen the Union as their bargaining agent and the Union's continued majority status cannot be questioned. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 64 S. Ct. 817 (1944); *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 62 S. Ct. 397 (1942).

Nor can there be any question, as the Company concedes, "Reinstatement and backpay are traditional remedies for violations of Section 8(a)(3)", citing *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941). See also: *N. L. R. B.* v. *J. H. Rutter Rex Mfg. Co.*, 396 U. S. 258, 263, 90 S. Ct. 417, 420 (1969); *Fibreboard Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 215, 85 S. Ct. 398, 405 (1964).

(Footnote continued from preceding page.)

To the extent that the language "pursuant to to the collective bargaining agreement between the parties which was in force and effect at the Buffalo plant . . ." (A. 46a) may be construed as requiring adherence to that contract, the Company cannot be heard to complain since it is merely being ordered to abide by the terms to which it had agreed. *H. J. Heinz Co.* v. *N. L .R. B.*, 311 U. S. 514, 526, 61 S. Ct. 320, 325 (1941).

Upon the foregoing, there can be no question in this case the Board has issued its common, traditional, Court approved remedy.

B. The Company's Contentions with Respect to the Remedy are Without Merit.

1. The Misconstruction of Section 8(d).

The Company argues that its bargaining goals will be thwarted by the order requiring it to reinstate those Buffalo employees desiring transfer to Alexander. First it must be pointed out that in its brief, but with no citations therefor, it claims its goals were "to place all applicants at the new plant on an equal footing, to avoid transfers with full seniority and benefits, and to hire personnel from the new location" (Pet. Brief, pp. 11-12).[13] The record does not support the Company's contention in brief. Among the Company's stated goals was to avoid hiring the union oriented and militant Buffalo workers (A. 19a, 21a, 24a n. 18); and indeed it never made any offer with respect to transfers (A. 30a-31a). Also, see *supra*, pp. 10-11. Therefore, the Company had no legitimate bargaining goals which will be affected by the remedial order.

Secondly, its reading of Section 8(d) is wholly distorted. That section insures that no party engaged in collective bargaining may be compelled to agree to a proposal or make a concession (29 U. S. C. § 158(d)) and this Court has held that the Board may not require an employer to agree to a proposal even after it had bargained in bad faith, *H. K. Porter Company* v. *N. L. R. B.*, 397 U. S. 99, 90 S. Ct. 821 (1970). In this case the Board has ordered the Company merely to continue to recognize and bargain with the Union; the Company has not been ordered to agree or concede to any Union position.[14]

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13. One cannot ignore the patent inconsistency that a policy to hire from the new location automatically precludes an "equal footing" for all applicants, including those from Buffalo.

14. The correctness of that portion of the order cannot be assailed. *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 610, 89 S. Ct. 1918, 1938 (1969) and the cases cited therein.

The Company has been ordered, however, to reinstate employees to their former employment,[15] and that employment has been continued to Alexander, the facility 30 miles away. To whatever extent reinstatement requires the application of the former terms and conditions or employment cannot be considered in violation of § 8(d) because these are terms and conditions which the Company had voluntarily agreed to in its last collective bargaining agreement with the Union (A. 46a) and, further the Company has agreed and offered to stipulate that Buffalo employees could perform or easily learn the work at Alexander and were "naturally preferred" (A. 36a-37a, 37a, n. 39). The Company's agreement to all such matters would properly require that it execute and abide by a written agreement to that effect, *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 61 S. Ct. 320 (1941), and thus the *H. K. Porter* rule and § 8(d) of the Act are wholly inapposite to this situation. Indeed, any other result would create the anomaly that the Company by committing unfair labor practices could achieve its unlawful purpose and enjoy the fruits of its misconduct. Such result obviously must be avoided.

2. The Circuit Courts' Decisions Are Consistent.

It is the Board's function to restore the situation, as nearly as possible, to that which would have obtained absent the unfair labor practice. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941). This necessarily means that each remedy must be tailored to meet the situation at hand and differences among the Circuit Courts, if any, must be analyzed as being either conceptual or differences based simply on different facts. The so-called "split" among the Circuit

15 There can be no question that reinstatement to remedy discriminatory terminations of terminations resulting from bad faith bargaining is most appropriate. *Phelps Dodge* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941); *Fibreboard Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 215, 85 S Ct. 398, 405 (1964).

Courts asserted by the Company is not a split on a policy basis but merely the result of different factual circumstances.

The Circuit Courts addressing the issue of reinstatement and backpay, as here, have enforced those orders and in some cases left the rate of backpay open to be determined later after bargaining.[16] In none of those cases did there exist, as here, an unexpired agreed upon contract which was precipitously abandoned, yet, in this case, the Board tailored its backpay order by applying a rate, 40 cents per hour less, prevailing at that time in the Alexander area and offered by the Union, in order to restore the situation, as nearly as possible, to that which would have obtained but for the illegal acts (A. 42a-43a, n. 48). Of course the Court can take notice of the extraordinary inflation and corresponding rise in wages since 1973, therefore the backpay will not fully compensate discriminatees for all losses. To whatever extent there are uncertainties, if there are any at all after the reduction of 40 cents, which flow from this situation, said uncertainties should be borne by the wrongdoer whose unlawful deed created the uncertainties. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265 66 S. Ct. 574, 580 (1946).

With respect to Union recognition, all Circuit Courts are agreed that recognition of the Union at the new location is appropriate if upon the particular facts in the case a majority of the employees would have transferred. *Cooper Thermometer Company* v. *N. L. R. B.*, 376 F. 2d 684, 690 (2nd Cir. 1967); *N. L. R. B.* v. *Die Supply Corporation*, 393 F. 2d 462, 468 n. 9 (3rd Cir. 1968); *Fraser & Johnston Company* v. *N. L. R. B.*, 469 F. 2d 1259, 1265 (9th Cir. 1972). Here it cannot be questioned that if the employees had not been discriminatorily terminated, the Alexander plant would have been staffed entirely

16. *Cooper Thermometer Company* v. *N. L. R. B.*, 376 F. 2d 684, 691 (2nd Cir. 1967); *Fraser & Johnston Company* v. *N. L. R. B.*, 469 F. 2d 1259, 1266 (9th Cir. 1972). In *N. L. R. B.* v. *Die Supply Corporation*, 393 F. 2d 462, 468 n. 9 (3rd Cir. 1968), the Court enforced the backpay order without regard to any resulting change in rates.

by Buffalo employees, all of whom were represented by the Union, and there is no indication of any intention by any one of them to be otherwise (A. 42a).

Therefore it is clear that the asserted split among the various Circuits ruling on these situations is based upon the different facts of each case, and, more importantly, said Circuits are uniform in their approval of the types of remedies which are appropriate.

CONCLUSION.

Upon the foregoing it is respectfully submitted that the Company's petition be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 75-1705 September Term, 1974

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

ALLIED MILLS, INC.,
Respondent

ORDER

On consideration of the motion of the American Federation of Grain Millers, Local 110, AFL-CIO ("Union") for leave to intervene herein, it is

ORDERED that the aforesaid motion is granted.

Counsel for the aforesaid intervenor may participate in oral argument only to the extent allowable under Rule 12 of the General Rules of this Court.

For the Court:
HUGH E. KLINE,
Clerk,
By: /s/ DANIEL M. CATHEY,
Daniel M. Cathey,
First Deputy Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1160

ALLIED MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. 51a-52a) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 11a-48a, 49a-50a) are reported at 218 NLRB 281.

JURISDICTION

The order of the court of appeals was issued on October 26, 1976. A timely petition for rehearing and suggestion for rehearing en banc was denied on December 30, 1976. A formal judgment was then entered on February 15, 1977. The petition for a writ of certiorari was filed on February 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner refused to transfer employees to its relocated plant for antiunion reasons, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, and refused to bargain in good faith about the transfers, in violation of Section 8(a)(5) and (1) of the Act.

2. Whether the Board's order properly directs petitioner to offer reinstatement with backpay to the employees to whom it discriminatorily denied transfers and to recognize and, upon request, to bargain with the union as the bargaining representative of the unit employees at the relocated plant, pursuant to the collective bargaining agreement in effect at the time of the relocation, unless the parties mutually agree to do otherwise.

STATEMENT

In 1973 petitioner closed its plant in Buffalo, New York, and opened a new plant in Alexander, New York, approximately 30 miles away (Pet. App. 12a). Petitioner's production and maintenance employees at the Buffalo plant were represented by the American Federation of Grain Millers, Local 110, AFL-CIO ("the Union"), and were covered by a collective bargaining agreement that was not due to expire until June 30, 1974 (Pet. App. 12a). Although petitioner offered to transfer all its non-union office employees and supervisors to the new plant (Pet. App. 36a), it refused to transfer any of the union-represented employees (Pet. App. 14a-15a). Instead, petitioner staffed the production and maintenance operations at the Alexander plant entirely with newly hired employees (Pet. App. 15a).

After a six-day hearing, the administrative law judge found that petitioner had refused to transfer unit employees from Buffalo to Alexander for antiunion reasons, in violation of Sections 8(a)(3) and (1) of the National Labor

Relations Act, 29 U.S.C. 158(a)(3) and (1) (Pet. App. 37a-40a); had refused to bargain in good faith about the transfer of the unit employees, in violation of Sections 8(a)(5) and (1) of the Act (Pet. App. 29a-38a); and had threatened unit employees that it would not transfer any of them to Alexander and would not have a union there, in violation of Section 8(a)(1) of the Act (Pet. App. 23a-25a). The Board affirmed those findings and conclusions, and adopted the recommended order.

The order directs petitioner to cease and desist from the unfair labor practices found and from interfering, in any other manner, with the exercise of employee rights under Section 7 of the Act (Pet. App. 45a-46a). In addition, the order directs petitioner (1) to offer reinstatement with backpay to employees who indicated a desire to transfer to the new plant by signing a posted transfer list and to dismiss, if necessary, employees hired to replace them; (2) to put on a preferential hiring list employees deterred from indicating a desire to transfer by petitioner's unfair labor practices; (3) unless the parties otherwise mutually agree, to recognize and, upon request, to bargain in good faith with the Union as the exclusive bargaining representative of the unit employees at Alexander, pursuant to the collective bargaining agreement that was in force and effect at the time of the relocation to Alexander; and (4) to post and mail appropriate notices to the Buffalo employees (Pet. App. 40a-44a, 45a-50a).

The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 51a-54a).

ARGUMENT

Contending that the Board's findings of fact are not supported by substantial evidence (Pet. App. 7, n. 11), petitioner in this case makes several arguments largely dependent upon its own version of the facts. None merits further review.

1. Contrary to petitioner's contentions (Pet. 6 n. 10, 7 n. 11, 10-13, 15-20), the Board's findings of discriminatory motivation and bad faith do not rest on inferences derived solely from petitioner's bargaining proposals. The findings rather rest upon specifically credited testimony regarding statements by petitioner's representatives that unit employees would not be transferred to the new plant because they were "too union-oriented, and militant," that none of the union-represented employees would be transferred, and that there would not be a union at the Alexander plant (Pet. App. 19a, 21a, 23a-24a, 31a n. 27). In light of these statements, there was ample support for the Board's findings that petitioner "utilized the move [from Buffalo to Alexander] to rid itself of the Union as the collective-bargaining representative of the employees in the bargaining unit" (Pet. App. 29a-30a)[1] and that it failed to bargain in good faith about the terms on which unit employees might transfer, having adopted a "predetermined policy of refusing to transfer to Alexander any of the Buffalo employees represented by the Union" (Pet. App. 31a).[2]

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[1]The Board expressly found that petitioner's refusal to transfer and termination of the unit employees occurred "because of the employees' union or concerted activities, and was done for the purpose of discouraging membership in the union in violation of Section 8(a)(3) of the Act" (Pet. App. 38a). Alternatively, it held that petitioner's refusal to transfer the union-represented employees, while offering transfers to nonunion employees and supervisors, was conduct "so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive" (Pet. App. 39a, citing *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34).

[2]The Board found, contrary to petitioner's contention (Pet. 5, n. 6), that "this is not a case where the Union was insisting upon a transfer of all employees or, indeed, upon any specific precondition of transfers" (Pet. App. 31a).

2. Petitioner contends (Pet. 8-15) that the Board's order requiring reinstatement of certain employees and award of backpay exceeds its authority under Section 8(d) of the Act.[3] Although it is well-established, as petitioner concedes (Pet. 10), that reinstatement and backpay are appropriate remedies for unlawful employment discrimination and the unilateral alteration of working conditions following a refusal to bargain (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 187-189; *National Labor Relations Board* v. *J. H. Rutter Rex Mfg. Co.*, 396 U.S. 258, 262-263; *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215-217), petitioner nevertheless suggests (Pet. 5 n. 7, 7, 10-14) that the traditional remedy is inappropriate here because the jobs at the new plant allegedly are not comparable to those at the old plant and the parties allegedly have not agreed on the terms and conditions under which the Buffalo employees may transfer to Alexander. The Board concluded, however, on substantially undisputed evidence, that petitioner's "operation at Alexander is a continuation of its former plant in Buffalo" (Pet. App. 41a, 25a-27a), that the Buffalo employees could perform the unit jobs at Alexander with little or no training (Pet. App. 36a-37a), and that the terms and conditions of employment applicable at Alexander are those previously in force at Buffalo under the collective bargaining agreement, unless the parties mutually agree otherwise (Pet. App. 40a-41a n. 46).[4] Under those circumstances the Board's order was well within the scope of its legitimate authority.

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[3]The Board's order directs petitioner to offer the Buffalo employees who indicated a desire to transfer reinstatement "to their former or substantially equivalent positions at [Alexander]" and to make them whole for any backpay lost (Pet. App. 42a).

[4]Backpay is to be computed at a rate that is 40 cents an hour less than the Buffalo rate to reflect the lower wage rates prevailing in Alexander. The Union conceded that the lower rate would be appropriate (Pet. 42a-43a n. 48).

Nor does the order improperly impose an agreement upon petitioner against its will (Pet. 9-12). Cf. *H.K. Porter* v. *National Labor Relations Board*, 397 U.S. 99. The order simply holds petitioner to the contract terms to which it had agreed and from which it unlawfully sought to escape. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357.[5] The order further restores the employment conditions that petitioner unilaterally altered and, thus, establishes a proper predicate for future good faith bargaining. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, *supra*, 379 U.S. at 216.

3. Petitioner also contends (Pet. 15-20) that the Board's decision limits an employer's right to formulate legitimate bargaining proposals concerning transfer of employees in the event of plant relocation (Pet. 15-20). That construction of the Board's decision is incorrect. The decision merely holds that an employer fails to bargain in good faith when he refuses to discuss transfers with the union because he has determined for discriminatory reasons not to transfer union-represented employees.[6]

Although the Board considered much of the same evidence in making its findings of discrimination in employment, in violation of Section 8(a)(3) and (1), and of bad faith bargaining, in violation of Section 8(a)(5) and (1), that fact alone does not constitute an "improper use of inference upon inference to find bad faith" (Pet. 20). Compare *United*

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[5]The contract may be terminated or modified, upon proper notice, 60 to 90 days prior to its June 30 anniversary date; otherwise, it is automatically renewed from year to year. See *National Labor Relations Board* v. *Beverage-Air Co.*, 402 F. 2d 411, 417 (C.A. 4).

[6]Thus, no conflict is presented with cases cited in the petition (pp. 17-19) holding that the Act does not require the making of a concession or authorize the Board to sit in judgment upon the substantive terms of collective bargaining agreements.

States v. *Ross*, 92 U.S. 281. As noted above (p. 4), the Board's findings of discriminatory motivation and bad faith do not rest exclusively upon inferences drawn from petitioner's bargaining conduct. In any event, when an employer discriminates in employment by denying transfers to employees because they are represented by the union, he also bargains in bad faith by refusing to discuss any terms upon which union-represented employees may transfer. The Board cannot be barred from finding a violation of Section 8(a)(3) of the Act merely because a part of the evidence supporting that finding also shows a violation of Section 8(a)(5).

4. Finally, the Board's order to recognize and bargain with the Union does not impose a bargaining representative on employees who never selected it. Cf. *Local 57, International Ladies' Garment Workers' Union (The Garwin Corp.)* v. *National Labor Relations Board*, 374 F. 2d 295, 300 (C.A. D.C.), certiorari denied, 387 U.S. 942 (Pet. 15 n. 15). The Board's order of reinstatement contemplates that numerous Buffalo employees will be transferred to Alexander and will constitute all or a substantial majority of the unit complement there. Accordingly, "continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate." *K.B. & J. Young's Super Markets, Inc.* v. *National Labor Relations Board*, 377 F. 2d 463, 465 (C.A. 9), certiorari denied, 389 U.S. 841. See also *Lewis d/b/a California Footwear Co.*, 114 NLRB 765, 769-770, enforced, 246 F. 2d 886, (C.A. 9).[7]

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[7]The Board found, on substantial evidence, that enough Buffalo employees had indicated a desire to transfer to Alexander by signing the transfer list to staff the new plant (Pet. App. 42a, 18a, 21a), and that the 30-mile distance between Buffalo and Alexander did not make transfers impracticable (Pet. App. 35a-36a). Cases cited by petitioner (pp. 13-15 and n. 15) are distinguishable. In *Cooper Thermometer Co.* v. *National Labor Relations Board*, 376 F. 2d 684, 690 (C.A. 2), and *Fraser & Johnston Co.* v. *National Labor Relations Board*, 469 F. 2d 1259, 1265

CONCLUSION

The petition for certiorari should, therefore, be denied.

Respectfully submitted.

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MAY 1977.

(C.A. 9), it was found that the record evidence did not warrant an inference that a majority of the employees would have transferred to the relocated plants, absent the employer's unfair labor practices. In *National Labor Relations Board* v. *Die Supply Corp.*, 393 F. 2d 462 (C.A. 1), the court enforced the Board's order in full, including provisions requiring recognition and bargaining and reinstatement with backpay (393 F. 2d at 468, n. 9), but concluded that the collective bargaining agreement expired by its express terms when the employer "terminate[d] its operations" at the old plant (393 F. 2d at 465). In *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143, 149 (C.A. 6), certiorari denied, 371 U.S. 941, the court held, in a Section 301 suit, that the terms of the collective bargaining agreement limited its application to the company's plants "within the city limits of Detroit," Michigan, and did not provide benefits for employees in a plant relocated in Lebanon, Tennessee. The Board found here that the contract lacked words of geographical limitation and that it was not intended to terminate upon relocation of the plant 30 miles away. (Pet. App. 41a n. 46).